81-2230
No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

LINDA L. McGOUGH, *Petitioner,*

v.

THE STATE OF FLORIDA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Was not the petitioner denied due process of law and the right to a fair and impartial trial within the meaning of the due process clause of the 14th Amendment of the Constitution of the United States when the State's Attorney improperly argued to the jury on two occasions that he personally knew that the witnesses who testified against the Petitioner were telling the truth?

II. Was not the Petitioner denied due process of law and equal protection of the laws, and denied benefits conferred on a certain class of defendants in the State of Florida by the Supreme Court of Florida in *Tascano v. State,* 393 So.2d 540 (1980), which mandated that trial judges instruct the juries on the maximum and minimum sentences for the crimes on which the accused stood trial?

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1981 TERM

No.

LINDA L. McGOUGH, *Petitioner,*

v.

THE STATE OF FLORIDA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner herein prays for a writ of certiorari to review the judgment of the Supreme Court of Florida. This judgment denied review from the affirmance of the Petitioner's conviction by the District Court of Appeals, Fifth District, for the State of Florida. The final order denying review was entered on April 5, 1982, and is attached (Pet. App. 1a).

CITATION TO OPINIONS BELOW

The Supreme Court of Florida in its final order and judgment denied review without an opinion. The District Court of Appeals, Fifth District, State of Florida, entered an opinion affirming the conviction of the Petitioner for second degree murder. This opinion is attached (Pet. App. 6a).

JURISDICTION

The final judgment from the Supreme Court of Florida was entered on April 5, 1982. Jurisdiction is predicated on Title 28, U.S.C., Section 1257(3).

STATEMENT OF THE CASE

The Petitioner was charged with first degree murder. Petitioner was convicted of second degree murder. During the trial, the State's Attorney in his closing to the jury, made wholly improper arguments telling the jury, in two instances, that the main government witnesses who testified against the Petitioner were known by him to be telling the truth because, from interviews with him they knew that they would be prosecuted for perjury if they testified falsely (Tr. 10, Pet. App. 3a). The State's Attorney referred again in closing argument to the testimony of a second witness and specifically advised the jury that he knew she was telling the truth because she had come into his office where he confronted her with a statement he had elicited from another witness which he believed to be true and advised her that she would be prosecuted for perjury if she did not testify truthfully. Petitioner's counsel noted his objection and moved for a mistrial. Mistrial was denied; the trial judge contented himself with instructing the jury in the general charge to the jury that statements of counsel were not to be construed as evidence. Even though raised in the appellate process of the State of Florida, this constitutional issue was not discussed in either the opinion of the District Court of Appeals of the State of Florida or by the Supreme Court of Florida.

During the course of the trial, the Petitioner's counsel requested the Court to instruct the jury on the penalty

sentences which may be imposed for the offense for which the Appellant was on trial (first degree murder), and the lesser included offenses (second degree murder and manslaughter) (Tr. 3 & 4, Pet. App. 2a).

The trial of the Petitioner was on May 16, 1980, and on June 5, 1980 the Supreme Court of Florida entered a decision in the case of *Tascano v. The State of Florida,* 393 So.2d 540, (Fla. 1980) mandating under Fla.R.Crim.P. 3.390(a) that it would be mandatory upon request of either an accused or the State, to instruct the jury on the maximum and minimum sentences that may be imposed. The Supreme Court of Florida ruled that its opinion would not be retroactive, but would operate prospectively and would also apply to all defendants who had preserved this point on appeal, and whose appeals had not yet been decided. This District Court of Appeals for the Fifth District of the State of Florida, and the State of Florida in its opinion, ruled that the Tascano case did not apply to the Petitioner.

STATUTES AND RULES INVOLVED

Section 1: 14th Amendment to the Constitution

> * * * nor shall any state deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

The Petitioner was denied due process of law and the right to a fair and impartial trial when the prosecutor improperly argued to the jury that he knew from personal interviews with his witnesses that they were telling the truth, which was verified by his established policy of advising the

witnesses they would be prosecuted for perjury if they did not testify truthfully. In *Berger v. United States*, 295 U.S. 668, 55 S.Ct. 629 the Court stated:

> It is more or less fair to say that the average jury in a greater or lesser degree has confidence that these obligations so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry very much weight against the accused when they should properly carry none.

Against the important expression of this Court safeguarding the right of the accused to a fair trial and placing reasonable limitations upon the prosecutor, the Petitioner in this case suffered two very serious breaches of this principle during the closing argument of the prosecuting attorney. In referring to one of the state's witnesses who had testified against the Petitioner the prosecutor stated (Tr. 10, Pet. App. 3a):

> But he came down to my office and I advised him of perjury. I advised all witnesses. I advised them that, if they do not tell the truth and I can prove that they do not tell the truth, I will prosecute them for perjury, whether they did it in my office under oath or on the stand. If I ever catch a witness, I will prosecute them for perjury if I can prove it.

Not satisfied with this expression of personal opinion, the State's Attorney then proceeded to state (Tr. 11-12, Pet. App. 4a):

> I called Judy Willits next, and Miss Willits testified that she was at that time a topless

> dancer, and she saw no fight, or excuse me, she saw the start of the fight, but she never saw the victim, Philip Gauthier, with a knife in his hand. She told the police that. She told Mr. Kirkland that under oath. She came into my office for about an hour and told me that. I advised her of perjury. I advised her that, if she did not tell the truth, because I had David Gauthier's statement at that time, which I believed to be the truth, that I would prosecute her for perjury.

Thus, the prosecuting attorney in this case improperly laid before the jury that his independent investigation and his policy of advising his witnesses that they would be prosecuted for perjury, established that their testimony at trial against the Petitioner was, in fact, true.

Not only did the argument of the prosecuting attorney constitute a direct violation of this Court's pronouncement in *Berger v. United States,* supra, but the trial court did not perform the concomitant duty placed upon it of taking firm corrective action when the State's Attorney leant his personal credibility to the testimony of the witnesses who had testified against the Petitioner.

Indeed, this Court recently, in referring to *Berger v. United States,* supra, in a different context, made it clear that the trial judge has an important function of seeing to it that the accused receives a fair trial. *Gannet Company, Inc. v. DePasquale,* 443 U.S. 387, 99 S.Ct. 2898 (1979) in this Court stated:

> • • • The responsibility also requires him to be sensitive to the due process rights of a defendant to a fair trial. A fortiori the trial judge has the same dual obligation.

The record in this case shows improper action of the State's Attorney was extremely prejudicial and deprived the Petitioner of a fair and impartial trial. The record is equally clear that the trial judge did not satisfy his burden of taking corrective action in that regard. This serious error of constitutional dimensions was not even discussed or noticed by either the District Court of Appeals, Fifth District, in its opinion, or in the order of the Supreme Court of Florida denying review. It is clear that the instant decision is contrary to a line of decisions of the Supreme Court of Florida and various circuit courts of appeal, including those of the Fifth Circuit, which have followed this Court's pronouncement in *Berger v. U.S.*, supra; *Thompson v. State*, 318 So. 2d 549; *Wilson v. State*, 294 So.2d 327; *Goddard v. State*, 143 Fla. 28, 196 So. 596; *Blanco v. State*, 150 Fla. 98, 7 So.2d 333; *McMillan v. U.S.*, 363 F.2d 165 (5 Cir. 1966); *Henderson v. U.S.*, 218 F.2d 14 (6 Cir. 1955); *U.S. v. Dawson*, 486 F.2d 1236 (5 Cir. 1973); *U.S. v. Brown*, 451 F.2d 1231 (5 Cir. 1971).

The uitimate effect of the prosecutor's arguments in this case were to leave no doubt in the minds of the jury that his investigations established that he had knowledge that had not be received in evidence that would corroborate the witnesses' story. in fact, the prosecutor advised the jury that he had taken personal steps to verify the witnesses' statements, that he had done so, and that therefore there were matters outside the record which assured him that his witnesses had told the truth.

The Petitioner was denied due process of law, the right to a fair and impartial trial, and this Court should accordingly grant the Writ of Certiorari.

II

The refusal of the Florida Appellate Courts to accord the Petitioner the benefits of its ruling in *Tascano v. State*, 393 So.2d, 540 (Fla. 1980) deprived the Petitioner of due process of law and the equal protection of the laws.

In *Tascano v. State*, 393 So.2d 540, the Supreme Court of Florida ruled that all accused in Florida henceforth were mandatorily entitled to an instruction on the maximum and minimum offenses for which they were charged. This ruling involved the construction of Florida Rules of Criminal Procedure, 3.390(a). This rule reads:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of the argument of counsel and upon request of either the State or the defendant the judge shall include in said charge the maximum and minimum sentences which may be imposed (including probation) for the offenses for which the accused is then on trial.

The Florida Supreme Court gave the benefit of its ruling also to all defendants whose appeals had not yet been decided, and who had preserved the point on appeal. Petitioner's counsel had specifically requested the trial judge instruct the jury on the maximum and minimum sentences not only for the charge on which the Petitioner was on trial (first degree murder) but the lesser included offenses which were included within that charge, namely murder in the second degree and manslaughter. Petitioner was a member of the class of defendants who acquired the rights conferred by *Tascano v. State*, supra. The District Court of Appeals for the Fifth District in its opinion ruled that the Petitioner was not entitled to the benefits of the Tascano opinion. The District Court of Appeals stated:

> Although our Supreme Court has said a Tascano violation is reversible error, we do not believe Tascano applies here. There is no requirement in the law that the trial judge instruct the jury as to the penalty of a lesser included offense.

We submit to the Court that this decision is arbitrary, capricious and irrational in that when the Petitioner is on trial for first degree murder *he simultaneously is on trial for the lesser included offenses of second degree murder and manslaughter if there is any evidence to warrant submission of those charges to the jury.* Guaranty of due process demands that the law shall not be unreasonably arbitrary or capricious and that the means selected shall have a real and substantial relation to the object sought to be obtained, *Paramount Pictures v. Langer,* D.C.ND 1938. 23 F.Supp. 890, motion granted 59 S.Ct. 641, 306 U.S. 890.

Certainly the Petitioner in this case is being denied the equal protection of the laws specifically conferred upon all accused persons in the state of Florida pursuant to the state decision in *Tascano v. State,* 393 So.2d 540 (Fla. 1980), since his appeal was still pending and he had pursued the point dealing with instructing the jury on the maximum and minimum sentences involved.

While construction of a state criminal rule by the state courts would not ordinarily raise a constitutional issue for the Court's consideration, the construction of the Florida Criminal Rule by the Florida court created a class of defendants entitled to its benefits and the Court's action in denying the Petitioner who was a protected member of the class the rights under *Tascano v. State* has denied him the equal protection of the laws.

In light of the above, we ask this Court to grant the Petition for Writ of Certiorari and to reverse the judgment of the court below.

CONCLUSION

For the reasons state herein, a writ of certiorari should issue to review the judgment of the Supreme Court of Florida.

Respectfully submitted,

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